No. 89-1209

IN THE
Supreme Court of the United States
OCTOBER TERM, 1989

CHICAGO & NORTH WESTERN TRANSPORTATION COMPANY,
Petitioner,
v.
RAILWAY LABOR EXECUTIVES' ASSOCIATION, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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BRIEF OF RESPONDENTS RAILWAY LABOR EXECUTIVES' ASSOCIATION AND UNITED TRANSPORTATION UNION IN OPPOSITION TO PETITION

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On January 29, 1990, petitioner Chicago & North Western Transportation Company [hereinafter, "C&NW"] filed a petition with this Court for a writ of certiorari for this Court to review the decision of the United States Court of Appeals for the Eighth Circuit in *Railway Labor Executives' Association v. ICC*, 888 F.2d 1227 (8th Cir. 1989). Counsel for respondents Railway Labor Executives' Association [hereinafter, "RLEA"] and United Transportation Union [hereinafter, "UTU"] [1] was served with copies of that petition

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[1] RLEA is a voluntary unincorporated association of the Chief Executive Officers of seventeen national labor organizations which represent rail employees. A list of RLEA's member organizations is

on January 29, 1990, and on February 27, 1990, this Court extended the time in which respondents may file their briefs to and including March 21, 1990. Furthermore, on March 20, 1990 respondents sought a second extension of time to March 23, 1990, in which to file their brief; on March 21, 1990 this Court granted respondents' second extension of time request. This brief is respectfully submitted by respondents RLEA and UTU in opposition to the petition.

OTHER STATUTES INVOLVED

Respondents RLEA and UTU submit that, in addition to those constitutional and statutory provisions identified by petitioners as being involved in this case, the following statutes are also relevant:

1. Section 1(e) of the Administrative Procedure Act, 5 U.S.C. § 554(e) which provides as follows:

> The agency, with like effect as in the case of other orders, and in its sound discretion, may issue a declaratory order to terminate a controversy or remove uncertainty.

2. Section 2321(a) of the Judicial Code, 28 U.S.C. § 2321(a) which provides as follows:

> Except as otherwise provided by an Act of Congress, a proceeding to enjoin, suspend, in whole or in part, a rule, regulation, or order of the Interstate Commerce Commission shall be brought in the court of appeals as provided by and in the manner prescribed in chapter 158 of this title.

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attached hereto as Appendix A. Respondent UTU also represents rail employees; and together with RLEA's member organizations, respondents collectively represent virtually all organized rail employees in this country. Respondent UTU was a member organization of RLEA when the petition for review was filed by RLEA with the court of appeals, and has continued to participate in this case since it ceased being affiliated with RLEA in mid-April 1989. The various unions will be collectively referred to herein as "rail labor."

COUNTERSTATEMENT OF THE CASE

This controversy began on December 23, 1987, when petitioner C&NW and FRVR Corporation filed a pleading exercising the exemption, which the Interstate Commerce Commission [hereinafter, "ICC" or "Commission"] had granted in *Ex Parte No. 392, Class Exemption for the Acquisition and Operation of Rail Lines Under 49 U.S.C. 10901*, 1 I.C.C.2d 810 (1986), *aff'd sub nom. Illinois Commerce Comm. v. ICC*, 817 F.2d 145 (D.C. Cir. 1987) (table), to acquire and to operate approximately 208 miles of the C&NW's rail system. In that pleading C&NW and FRVR also "petition[ed] the Commission for clarification of the agency's exclusive jurisdiction over labor issues arising out of ICC-authorized transactions, so that such transactions can be implemented without time-consuming bargaining under the Railway Labor Act, . . . and cannot be blocked by a strike . . . ." Petition for Clarification at 1; Joint Appendix in 8th Cir. No. 88-1280 [hereinafter, "J.A."] at 9. C&NW and FRVR asked the Commission to "hold that the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the ICC's jurisdiction [over rail line sales]" *Id.* at 14; J.A. at 22.

According to the C&NW and FRVR, "[s]uch clarification is necessary and appropriate in light of certain recent court decisions, which have created uncertainty as to the procedures by which line sales are to be accomplished." Petition for Clarification at 14; J.A. at 22. Those decisions, the carriers argued, included two decisions involving the Pittsburgh & Lake Erie Railroad, one in which the Third Circuit held that the Norris-LaGuardia Act, 29 U.S.C. § 101, *et seq.*, was not to be accommodated to the Interstate Commerce Act, 49 U.S.C. § 10101, *et seq.*,[2] and the other in which a district court held that the railroad had an obligation to comply with the Railway

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[2] *RLEA v. Pittsburgh & Lake Erie R.R.*, 831 F.2d 1231 (3rd Cir. 1987), *vacated*, 491 U.S. —— (1989).

Labor Act's (45 U.S.C. § 151, *et seq.*) bargaining and status quo obligations before it sold its rail lines.[3] Both decisions, the petitioner argued, created an air of uncertainty that needed to be addressed by the Commission; as the carriers asserted, their transaction

> fits squarely within the scope of the *Ex Parte No. 392* class exemption, and presents no occasion for departing from the Commission's general policy against the imposition of labor protective conditions on such transactions . . . . Nevertheless, the transaction has been delayed and jeopardized by the climate of uncertainty resulting from recent court decisions that misinterpret the Commission's long-standing role in addressing labor issues arising out of transactions subject to the agency's jurisdiction.

Petition for Clarification at 32.

To correct this "climate of uncertainty", C&NW and FRVR asked the Commission to issue an expedited decision that, as relevant here:

> [C]larif[ied] the scope of its jurisdiction, which displaced the Railway Labor Act and the Norris-LaGuardia Act with respect to labor issues arising out of the transactions authorized by the Commission under the Interstate Commerce Act, even where the Commission finds that labor protective conditions are contrary to the public interest . . . .

Rail labor opposed the carriers' Petition for Clarification, asserting that the ICC lacked jurisdiction to decide the conflict of laws issues raised by the carriers. Moreover, rail labor also asserted that, if the Commission addressed the relationship between the Interstate Commerce Act and both the Railway Labor Act and the Norris-LaGuardia Act, the agency should reject the carriers' petition on the merits.

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[3] *RLEA v. Pittsburgh & Lake Erie R.R.*, 677 F.Supp. 830 (W.D. Pa. 1987), *aff'd*, 845 F.2d 420 (3rd Cir. 1988), *rev'd* 491 U.S. —— (1989).

On January 19, 1988, the Commission issued an order, with two of the five Commissioners dissenting, granting "an order clarifying jurisdiction . . . ." App. at 25a. This clarification, the ICC opined, was necessary to correct the error inherent in the courts' analysis in the *Pittsburgh & Lake Erie* cases, particularly the Third Circuit's decision upholding the Norris-LaGuardia Act, that "had an immediate impact on the formation of small railroads, threatening to halt the revitalization of the marginal railroad sectors—a restructuring that the Commission has found to be in the interest of carriers, labor, and the shipping public." App. at 19a. According to the Commission, its authority over line sales both superseded the Railway Labor Act and restored to the federal courts the jurisdiction to enjoin strikes that the Norris-LaGuardia Act had withdrawn. These results occurred because, the ICC explained:

> The Commission has exclusive and plenary jurisdiction over the sale, merger, or abandonment of rail lines. This authority was granted by Congress as a part of a regulatory framework, to ensure a rail transportation system in the public interest. As a necessary component of this regulatory framework, the Commission has had to preempt on occasion the operation of other laws to the limited extent necessary to remove obstacles to Commission approved transactions. Such preemption of labor legislation has been upheld even in circumstances where the Commission did not provide labor protection under its auspices. We believe this is the correct interpretation of the matter at issue.

App. at 23a (footnotes omitted).

In response to rail labor's argument that it lacked jurisdiction to entertain the railroads' petition, the Commission stated that: "It seems beyond question that the Commission has the authority to issue declaratory opinions." App. at 17a (footnote omitted). To support that statement, the ICC relied upon 5 U.S.C. § 554(e), as

"empower[ing it] in its discretion to issue declaratory orders to terminate controversy or remove uncertainty." App. at 17a n.22. In this case, the ICC concluded, there were two controversies that had to be resolved regarding the effect of its authorization of a transaction pursuant to an exemption from regulation under *Ex Parte 392*, *i.e.*, the Railway Labor Act issue and the Norris-LaGuardia question. It was to resolve both "controversies" identified by the C&NW and FRVR that the Commission issued its decision in this matter.

Rail labor filed a petition with the United States Court of Appeals for the Eighth Circuit under 28 U.S.C. §§ 2321(a), and 2341, *et seq.*, to review that ICC decision. C&NW and FRVR asserted that venue of the petition was improper in the Eighth Circuit, that the Commission's order was not a final order subject to judicial review, and that the Commission's decision was correct on the merits. On November 21, 1988, the Eighth Circuit issued its initial decision affirming the Commission's order as "clarified" by the court's opinion. App. at 9a. The court's clarification was that it was for the appellate court, and not the Commission, "to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act . . . ." App. at 6a. The court then stated that it adhered to its earlier view in *Burlington Northern R.R. v. UTU*, 848 F.2d 856 (8th Cir. 1988), in which it had held that the Railway Labor Act was superseded by the Interstate Commerce Act in *Ex Parte 392* rail line sale cases, but that the Norris-LaGuardia Act was not. App. at 6a. The Eighth Circuit did not address the arguments of C&NW and FRVR that venue of the petition was not proper in that court or that the court lacked jurisdiction to review the ICC's decision.

Petitioner C&NW, along with FRVR, filed a petition with this Court for a writ of certiorari to review that

appellate order, insofar as the court of appeals had ruled that the Commission erred in its analysis of the Norris-LaGuardia Act issue. *C&NW v. RLEA*, Sup. Ct. No. 88-1706. That petition requested this Court, if it did not grant the writ and "reverse the decision below on the NLGA issue" (*id.* at 6), to hold the petition in abeyance "for disposition by the Court in accordance with the *Pittsburgh & Lake Erie* decision." *Id.* Petitioner C&NW never mentioned in that petition that it was challenging the appellate court's jurisdiction to address the issues raised by rail labor's petition to review. Nor did the carriers challenge the venue of the court below.

Respondents RLEA and UTU filed a cross-petition on May 19, 1989, asking this Court to review whether the Commission had jurisdiction to issue the declaratory order in the first place. *RLEA v. ICC*, Sup. Ct. No. 88-1874, at 9-11. Respondents also asked in their cross-petition that this Court hold both the petition and the cross-petition in abeyance pending this Court's ruling in the *Pittsburgh & Lake Erie* case. *Id.* at 8.

On June 26, 1989, this Court granted the petition and cross-petition, vacated the lower court's judgment, and remanded for further consideration in light of the decision in *Pittsburgh & Lake Erie R.R. v. RLEA*, 491 U.S. —— (1989). On remand, the appellate court issued a decision on October 30, 1989, in which it stated that "it is for the courts, not the Commission, to decide whether the Railway Labor Act and the Norris-LaGuardia Act must be accommodated to the authority of the Commission under section 10901 of the Interstate Commerce Act." App. at 2a. The Court, thereupon, set aside the order of the ICC *in toto*. *Id.*

SUMMARY OF ARGUMENT

Respondents RLEA and UTU respectfully submit that this case, in particular because of its factual setting, does not present any issue worthy of review by this Court. First, it was petitioner C&NW, along with FRVR, which

petitioned the Commission to issue the order that is the subject of this proceeding, to aid them in their dispute with rail labor over whether the unions could compel the C&NW to bargain over the line sale to FRVR *before* the line was sold. Thus, it is disingenuous for the C&NW to now claim that the ICC's order, which was granted at its request, but over respondents' objection, did not decide any "controversy," and is, thus, unreviewable under the Hobbs Administrative Orders Review Act, 28 U.S.C. § 2341, *et seq.* And second, whatever objection petitioner may have had to the Eighth Circuit's venue in this case was waived when petitioner did not raise that issue in its initial petition in this case—*i.e.*, No. 88-1706. Consequently, even if this case presented issues that would otherwise be worthy of review by this Court, and respondents submit that no such issue is present, the factual situation in which those issues lie, makes the granting of the writ improvident.

ARGUMENT

1. Petitioner C&NW's assertion that this case presents a question concerning the court of appeals' jurisdiction to review "clarifying" orders of administrative agencies, that merits review by this Court, turns upon its factual claim that the Eighth Circuit, at rail labor's urging, "reached out" and "decided" important "issues in the absence of a concrete dispute as to someone's legal rights . . . ." Pet. at 20. In partial support of that claim, the C&NW points to the litigation currently pending in the Seventh Circuit, which was before this Court in 1988,[4] that involves the very line sale at issue in this case, and C&NW alleges that (Pet. at 12):

> [T]he question of the application of the RLA and the NLGA to the transaction is pending in the Seventh Circuit, where no party has argued that its rights

[4] *C&NW v. RLEA*, Sup. Ct. No. 88-464, *cert. denied*, 109 S.Ct. 493 (1988).

> have been determined with any legal effect by the Commission's *FRVR* opinion . . . .

Petitioner C&NW's allegations concerning the non-prejudicial nature of the ICC's FRVR decision, respondents respectfully submit, are incorrect.

This controversy began when the C&NW and FRVR sought to enlist the aid of the Commission in their efforts to preempt rail labor's arguments that the ICC's jurisdiction over line sales did not supersede the Railway Labor Act or restore to the federal courts the jurisdiction that the Norris-LaGuardia Act had withdrawn. This proceeding clearly presents a live case or controversy, and indeed, as the C&NW informed this Court in its first petition to this Court for a writ of certiorari in this matter, the questions "whether the NLGA and RLA must be accommodated to the ICA are still pending in the Seventh Circuit litigation." *C&NW v. RLEA*, Sup. Ct. No. 88-1706, at 3 n.2. Petitioner was successful in enlisting the aid of the Commission and obtained from that agency a declaration stating that, in view of the fact that it was the agency charged with administering the Interstate Commerce Act, the Commission's jurisdiction over the FRVR line sale superseded the labor statute and in essence restored to the federal courts the jurisdiction to enjoin strikes over line sales that the anti-injunction Act had withdrawn. Petitioner, as shown below, subsequently relied upon that ruling to support its arguments in the Seventh Circuit litigation that the Railway Labor Act and Norris-LaGuardia Act were to be accommodated to the Interstate Commerce Act.

While it is correct that neither rail labor nor the C&NW has asserted in the latest appellate proceeding in the Seventh Circuit involving the FRVR sale that the Commission's order in the FRVR case determined legal rights of the parties,[5] it must be remembered that the

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[5] Rail labor has appealed from the district court's order of October 6, 1989, granting a permanent injunction against a strike

briefs in the latest appellate proceeding were filed *after* the Eighth Circuit issued its ruling in this case. On the other hand, when the Seventh Circuit litigation was before that court in 1988, while the *FRVR* decision was still citable, the C&NW relied upon the ICC's *FRVR* decision eight (8) times as support for its argument that the ICC's powers over rail line sales superseded the labor and anti-injunction statutes. *C&NW v. RLEA*, 855 F.2d 1277 (7th Cir.), *cert. denied*, 109 S.Ct. 493 (1988), Brief for C&NW (7th Cir. No. 88-1504), filed April 8, 1988, at 9, 40, 41, 48-49, 55. Indeed, in that brief to the court of appeals, petitioner asserted that, "[i]t is the rulings based on that determination [in *FRVR* concerning the value of the ICC's line sale program] that RLEA collaterally attacks in this action." *Id.* at 40 n.25. Moreover, in that 1988 brief, the C&NW argued that: "[T]he ICC certainly has authority to set out the nature and scope of its *own* authority over labor protection in connection with rail transactions subject to ICC jurisdiction. *That analysis is entitled to substantial deference.*" *Id.* at 55 n.39 (first emphasis in original; other emphasis added).

In short, the facts of this case show that it is a very unique case where the C&NW and FRVR asked the Commission to intrude into this labor dispute, and the Commission erroneously accepted that invitation. Respondents RLEA and UTU challenged the ICC's jurisdiction to become enmeshed in this controversy, and that challenge eventually was sustained by the Eighth Circuit. Thus, petitioner is incorrect in asserting in sup-

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over this sale and from the court's dismissal of its counterclaim to enforce the Railway Labor Act's bargaining and status quo obligations. *C&NW v. RLEA*, 7th Cir. No. 89-3265. The portion of that appeal concerning the bargaining obligation, raises the issue of the relationship of the Railway Labor Act and the Interstate Commerce Act over this sale. Petitioner C&NW has also appealed from that district court order (7th Cir. No. 89-3436), challenging the issue that the district court concluded should be submitted to the adjustment boards.

port of its petition in this case that the appellate court "reach[ed] out to decide issues in the absence of a concrete dispute as to someone's legal rights . . . ." Pet. at 20. Once it is recognized that the ICC's decision was far more than just a "clarifying order," and was in fact a decision that was intended to have an impact on the controversy between rail labor and the C&NW, it becomes clear that this case does not warrant the investment of this Court's time and effort. This is especially true here, where this Court is being asked to decide an issue that is unique and of no practical consequence to the parties in light of this Court's decision in *Pittsburgh & Lake Erie* that effectively rejected the Commission's reasoning in *FRVR*.

2. Petitioner's second issue fares no better, because it, too, suffers from a fatal factual flaw. Venue is clearly a waivable defense.[6] But here, although the C&NW raised this defense to the proceeding in the Eighth Circuit when rail labor filed its petition with that court, petitioner did not preserve that issue when it filed its petition with this Court in No. 88-1706 for a writ of certiorari to review and to reverse the appellate court's decision on the *merits*. Moreover, when this case was remanded to the Eighth Circuit, petitioner C&NW did not raise this claim on the remand. Thus, although the C&NW initially asserted that venue of the petition for review was improper in the Eighth Circuit, it waived that argument in two separate ways, first, by failing to raise that contention in its original petition for a writ of certiorari in this case, and next, by failing to raise that argument after the Court remanded the case to the Eighth Circuit.[7]

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[6] *See, Leroy v. Great Western United Corporation*, 443 U.S. 173, 180 (1979); *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960).

[7] *See, Peoria & Pekin Union Ry. Co. v. United States*, 263 U.S. 528 (1923). The Court held that a venue provision in the Act could be, and was, initially waived by two parties and that although venue was properly challenged by the United States in the district court, it

Thus, even if this Court considered the venue issue to be an important question, it does not merit review in this factual setting.

CONCLUSION

For the reasons set forth above, the petition should be denied.

Respectfully submitted,

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waived that argument by failing to raise it on appeal stating, "by failure to enter a cross-appeal from the court's action in overruling its [venue] objection, the right to insist upon it here was lost." *Id.* at 536.

APPENDIX

APPENDIX

APPENDIX A

Organizations Whose Chief Executive Officers Are Railway Labor Executives' Association Members

American Railway & Airway Supervisors Association (Division of TCU);
American Train Dispatchers Association;
Brotherhood of Locomotive Engineers;
Brotherhood of Maintenance of Way Employes;
Brotherhood of Railroad Signalmen;
Brotherhood Railway Carmen (Division of TCU);
Hotel Employees and Restaurant Employees International Union
International Association of Machinists and Aerospace Workers;
International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers and Helpers;
International Brotherhood of Electrical Workers;
International Brotherhood of Firemen & Oilers;
International Longshoremen's Association;
National Marine Engineers' Beneficial Association;
Seafarers International Union of North America;
Sheet Metal Workers' International Association;
Transport Workers Union of America; and
Transportation•Communications International Union (TCU).